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IN THE

SUPREME COURT OF THE UNITED STATES

No. 81-122

VALLEY NEWS
Petitioner,

v.

James F. McCusker,
Respondent

ON APPEAL FROM THE NEW HAMPSHIRE SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STANLEY M. BROWN, ESQ.

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NEW HAMPSHIRE CONSTITUTION

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STATEMENT OF THE CASE

The following is deemed necessary to correct inaccuracies and ommisions in the Petitioner's Statement of the Case:

Wholly contrary to the Petitioner's assertion that the standard of proof for a private individual was not addressed by the respondent in its brief, the entire thrust and import of plaintiff's brief was that the plaintiff below should not be held to the imposing burden placed upon a public official or public figure, but rather to be left to the lesser standard of proof for a private individual.

In fact, the respondent set forth the following in his brief below:

> According to the holding of *Gertz*, the level of constitutional protection to be afforded defamatory speech now depends upon whether the plaintiff is a public or private person, and not upon the subject matter of the speech. A public figure has greater access to the media and is therefore more able to contradict criticism and expose falsehood. Furthermore, a public figure voluntarily exposes himself to injury from falsehood by the media attention he commands. A private individual, on the other hand, neither has access to the media to counteract false statements nor assumes the risk of publicity. The state's interest in compensating private individuals for harm inflicted by defamatory falsehood is thus correspondingly greater.
>
> [S]o long as they do not impose liability without fault, the States may define for themselves the

> appropriate standard of liability for a publisher or broadcaster of defamatory falsehoods injurious to a private individual.
>
> 418 U.S. at 347. See, e.g., *Stone* v. *Essex County Newspaper, Inc.,* 367 Mass. 849, 330 N.E. 2d 161 (1975). A plaintiff who is a "public figure", however, is subject to the more onerous burden of proof established by *New York Times.*

The defendant's decision to ignore this issue and that portion of plaintiff's brief referred to, is not justification to attack the opinion of the New Hampshire Supreme Court.

It was well within the authority and discretion of the Court, and necessary to clarify the opinion of the Court, to include reference to the necessary burden for those persons determined to be neither public officials nor public figures.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW WAS CORRECTLY DECIDED.

The Petitioner first argues that it was error for the New Hampshire Supreme Court to affirm the Superior Court's determination that summary judgement on the public official issue was inappropriate, in this case, because there were factual issues presented to be determined by the jury. The Petitioner claims this was "clear error" especially in light of this Court's statement in *Rosenblatt v. Baer,* 383 U.S. 75, 88 (1966), that the decision as to whether the plaintiff in a defamation action is a public official is for the trial judge in the first instance.

The New Hampshire Supreme Court, in the present case, discussed the above cited statement of this Court, yet stated:

> "[H]owever, in *Baer* v. *Rosenblatt*, 108 N.H. 368 (1967), decided after remand from the Supreme Court, we held that the Constitution of this State, N.H. Const. Pt. I, Arts. 14 and 20, entitled the plaintiff to a jury trial on this issue with proper instructions from the Court. We reinforced this position in *Thomson* v. *Cash*, *119 N.H. 371 (1979)*."
>
> *McCusker* v. *Valley News* 121 N.H. (1981).

In this case, the New Hampshire Supreme Court recognized that this Court, in remarking that the issue of whether an individual is a public official was in the first instance for the trial judge, "was concerned with the possibility that a jury, in making the determination would be influenced by its view of the defendant and his publication." The Court ruled, however, that since the issue is factual, it is required to be submitted for jury determination under the New Hampshire Constitution and that careful instructions to the jury and use of a special verdict on the public official issue would dispel the concerns of this Court. *Id.*

The Petitioner cites *St. Amant* v. *Thompson*, 390 U.S. 727 (1968), and claims that "without hesitation, this Court accepted the lower court determination that a deputy sheriff. . . was a public official." A proper reading of this Court's language in the cited case shows:

> "*For purposes of this case, we accept the determination of the Louisiana Courts that. . . Thompson was a public official.*" (Emphasis added).

The Louisiana Court had concluded, after considering its state law, that a deputy sheriff has substantial responsibility for, or control, over, the conduct of governmental affairs at least where law enforcement and police functions are concerned. 250 La. at 422, 196 So. 2d at 261. This Court was clear in that it accepted the determination made by this particular state as to whether a person was a public official. This Court did not adopt any standard of its own as to whether all deputy sheriffs, in all instances would be deemed public officials for the purposes of the present case.

The Petitioner also incorrectly states that the New Hampshire Courts recognize that deputy sheriffs are public officials, and cites *Demers* v. *Bisbee*, 106 N.H. 354 at 356 (1965), which held, "we think that it must be true that sheriffs and their deputies, like other public officers, are under a general duty to exercise reasonable skills and diligence in performance of their official duties. . .". In that case, a deputy sheriff failed to properly serve process on a party, and as a result of this failure, damages resulted to another party. The Court held that the deputy sheriff may be held to answer to persons sustaining special damage as a result. At no time does this case discuss or attempt to discuss whether a deputy sheriff, or any other person employed by a public agency, is a public official for the purposes of defamation cases, and to so indicate to this Court is misleading.

In the present case, the New Hampshire Supreme Court has precisely expressed its past and present holding that the plaintiff-respondent is entitled to a jury trial in the first instance, with proper instructions from the court, as to whether he was a public official at the time of this libel.

II. THE DECISION OF THE NEW HAMPSHIRE SUPREME COURT IS CONSISTENT WITH DECISIONS OF THIS COURT, THE CIRCUIT COURTS AND THE STATE COURTS.

The Petitioner has claimed that the New Hampshire Supreme Court has erroneously adopted a negligence standard of recovery. The Petitioner claims that the New Hampshire Supreme Court adopted this standard with reference only to this Court's holding in *Gertz* v. *Welch*, 418 U.S. 323 (1974). *Gertz* allows the individual states to impose liability for defamation under any standard except strict liability. The Petitioner cites Justice Brennan's dissenting opinion in *Gertz*, claiming that adoption of "a reasonable-care standard in cases where private individuals are involved in matters of public interest—the probable result of today's decision—will. . . lead to self-censorship since publishers will be required carefully to weigh a myriad of uncertain factors before publication." However, in the States which have adopted a negligence standard, the courts have expressed overriding state concerns which counterbalance those of concern to Justice Brennan.

In *Taskett* v. *King Broadcasting Co.*, 86 Wash. 2d 439, 546 P. 2d 81 (1976), the Court said:

> "It has been argued by the defense that to reduce the standard first enunciated in *New York Times*, and subsequently adopted in both *Rosenbloom* and *Miller*, (*Miller* v. *Argus Publishing Co.*, 79 Wash. 2d 816, 490 P. 2d 101) will have a 'chilling effect' upon the press and, therefore, result in self-censorship. We find this contention to be without merit. It is true that greater caution must

> now be exercised where the subject of a publication is a private person, yet such a rule is totally justifiable in light of the State's overriding interest in providing a realistic remedy to an otherwise helpless private citizen. It cannot be gainsaid that any social value derived is 'clearly outweighed by the social interest in order and moraltiy.' *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572, 62 Sup. Ct. 766, 799, 86 L. Ed. 1031 (1942)."

In *Troman* v. *Wood*, 62 Ill. 2d 184, 340 N.E. 2d. 292 (1976), the Illinois Supreme Court said:

> "The defendant concedes that the Federal Constitution does not require Illinois to apply the *New York Times* standard as a matter of State policy. The arguments in support of that position lean heavily on the adverse effect of freedom of the press which would supposedly follow in the absence of the actual malice standard. But, the extent to which liability for defamation adversely affects freedom of speech and press is a Federal constitutional question, and it has been authoritatively determined by the Supreme Court that a standard of liability less rigorous than that of actual malice will not impermissibly abridge that freedom."

And the Arizona Supreme Court, in *Peagler* v. *Phoenix Newspapers, Inc.*, 114 Ariz. 309, 560 P.2d 1216 (1977), said:

"In *Gertz*, the Court said:

> 'The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood. We would not lightly require the state to abandon this purpose. . . ' 418 U.S. at 341.
>
> Nor do we think a state should be so solicitous of a publisher of defamatory falsehood that he is virtually insulated from the consequences of his wrong."

The State courts cited above, along with those of many other states, have adopted this negligence standard as a means to protect private individuals from the adverse effects of defamation. The New Hampshire Supreme Court, concerned with the constitutional right in New Hampshire to a remedy to injury to character has likewise adopted this negligence standard.

The decision by this Court in *Gertz* to allow the states to adopt their own appropriate standard of liability, has been reaffirmed and followed by this Court and the circuit courts. See, *Time, Inc.* v. *Firestone*, 424 U.S. 448 (1976); *Wolston* v. *Readers Digest*, 443 U.S. 157 (1979); *Steaks Unlimited* v. *Deaner*, 623 F. 2d 272 (3rd Cir. 1980); *Brewer* v. *Memphis Pub. Co., Inc.*, 626 F.2d 1247 (5th Cir. 1980). In *Brewer*, it was stated, ". . . as the prior panel of this Court held *Gertz* prohibits the states from allowing liability without fault, from 'presuming' fault. *Brewer, supra* at 702. *The overwhelming majority of state courts responding to this mandate have adopted negligence as the rule of liability.*" (Emphasis added).

The New Hampshire Supreme Court has accepted the rationale and the negligence standard permitted by this Court, and adopted by the majority of jurisdictions.

III. THE DECISION BELOW DOES NOT PRESENT AN IMPORTANT OR SPECIAL ISSUE FOR WHICH REVIEW SHOULD BE GRANTED.

This Court, in *Layne and Bowler Corp.* v. *Western Well Workers*, 261 U.S. 387, 393 (1923) stated a fundamental principle regarding review by Writ of Certiorari:

> ". . . it is very important that we be consistent in not granting the Writ of Certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties. . ."

Supreme Court Rule 17.1 embodies this same principle by stating that review is " not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor."

The New Hampshire Supreme Court noted in its decision in *Rosenblatt* v. *Baer, supra*, after remand of that case by this Court, that this issue of whether or not a person is a public official is one of fact required by the New Hampshire Constitution to be tried by jury, and is not a matter of law. Therefore, the Petitioner's argument that the plaintiff-respondent was a public official as a matter of law is without merit. The resolution of this issue, as it applies to this case, has yet to be tried before a jury in a New Hampshire trial court.

The Petitioner's second argument that the New Hampshire Supreme Court erred in adopting a negligence standard in a non-public official/public figure libel case is likewise without merit. This issue has been fully considered and explained by this Court, and *Gertz* expressly permits the states to determine the standards to be applied in cases involving private individuals. The New Hampshire Supreme Court's holding is in accordance with *Gertz*, and therefore, Petitioner's second argument does not bring this case within the requirements of Supreme Court Rule 17.1.

CONCLUSION

This case does not present conflict between decisions of this Court and the New Hampshire Supreme Court. Rather, the law in this area has finally been carefully, precisely, and clearly set forth by this Court in *Gertz*, and the New Hampshire Supreme Court is merely implementing that law. The case does not present the necessary requisites to warrant a review on Writ of Certiorari, and Petitioner's request should be denied.

With respect to the Petitioner's argument that it was denied due process as to the setting of this standard, this issue was briefed by the Respondent in this case. The Petitioner chose to ignore it, and the Petitioner now has no standing to complain.

RESPECTIVELY SUBMITTED

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